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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM—1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

BRIEF OF NEW YORK STATE HOTEL ASSOCIATION AS AMICUS CURIAE.

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Statement.

By consent we file this brief on behalf of the New York State Hotel Association, which is representative of the industry, and has within its membership more than 1,000 hotel operators, who employ a large number of women.

The New York Minimum Wage Law (Chapter 584, Laws, 1933, Article 19, State Labor Law) permits the fixing in the manner therein described of minimum wages for women and minors employed in trade and industry throughout the

State. We make no point with regard to its constitutionality as applied to minors.

The first industry to which the law was applied was the laundry industry for which a mandatory order fixing minimum wages for women employed in that industry was in force and effect; and for violation of which order the relator was indicted.

In 1935 a Minimum Wage Board was appointed by the Industrial Commissioner to investigate wages and conditions of labor of women and minors in the hotel and restaurant industries, in which upwards of 60,000 women are employed.

This Board filed its report and proposed minimum wage order, which were approved by the Industrial Commissioner on December 6, 1935. A copy of such proposed order is hereto appended, marked Exhibit A.

If the statute is sustained as valid, the Industrial Commissioner will in due course issue an order requiring the payment of minimum wages, in accordance with the findings and recommendations of the Wage Board, to all adult women employed in hotels and restaurants throughout the State.

The law has not yet been applied to any other industries in the State, but the Commissioner has the power, and on the petition of fifty or more residents of the State is under a duty, to apply the law to women employed in any and all other industries in the State in the manner outlined in the statute.

The large investment in hotels and restaurants in the State and the large number of adult women employed in these establishments makes the law a matter of vital interest both to employers and employees in these industries.

The Issue.

The sole issue is the constitutionality of the law.

The Argument.

I.

The nature and scope of the New York Minimum Wage Law.

II.

The Act of Congress had one standard, the living wage; this State has added another; reasonable value; the minimum wage must include both.

III.

The factual background of the District of Columbia minimum wage law and the New York minimum wage law is essentially the same.

IV.

A minimum wage for women alone is not corrective of the conditions recited as justifying its enactment, either as a protection to women, industry, or public welfare. The statute discriminates against women in their competition with men for employment.

V.

The law deprives employers and employees of their rights under the Fourteenth Amendment of the Federal Constitution and under Article 1, Sec. 6 of the State Constitution.

POINT I.

The nature and scope of the New York Minimum Wage Law.

There are certain important features of the law which are not subject to controversy.

1. It applies only to adult women and minors; not to men.

2. It is not an emergency law.

3. It is a wage-fixing law, pure and simple. It does not regulate hours or conditions of labor. It is not concerned with safety and protection of employees in dangerous employment. It is concerned only with the amount of wages to be paid to adult women and minors, and delegates to a Wage Board and to the Industrial Commissioner of the State authority to fix and prescribe the wage rate or rates.

4. It is applicable to any and all industries, trades or businesses, except only "domestic service in the home of the employer or labor on a farm", in which women or minors are gainfully employed (§551, Par. 6).

5. Paragraph 7 of Section 551 provides:

> "'An oppressive and unreasonable wage' shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health."

Paragraph 8 of the same section provides:

> "'A fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered."

Section 552 provides:

"It is hereby declared to be against public policy for any employer to employ any women or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

6. The Wage Board appointed by the Industrial Commissioner to report and recommend minimum wages in any industry, is composed of nine members, three representing employers and three representing employees in the industry and the other three disinterested persons representing the public.

The Board has full power to subpoena witnesses and records and at the conclusion of its investigation and within sixty days of its organization "shall submit a report including its recommendations as to minimum fair wage standards for women and minors in the occupation or occupations, the wage standards of which the Board was appointed to investigate."

The Board may differentiate and classify employments according to the nature of the service rendered and recommend "appropriate minimum fair rates for different employments". It may recommend fair wage rates varying with localities, if such differentiation does not affect an unreasonable discrimination against any locality. It may recommend suitable rates for learners and apprentices, which rates may be less than those recommended for experienced workers (Section 555).

The Industrial Commissioner may reject or accept such report. If he accepts it he holds a public hearing or hearings at which those for and against the recommendations may be heard. After such hearings the Commissioner shall

approve or disapprove the report. If he disapproves it he may re-submit the matter to the same Board or appoint a new Board. If the Commissioner approves the report of the Board he "shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the Wage Board" and in connection therewith make administrative regulations governing learners, piece rates, over-time rates, deductions for board, lodging or other service furnished by the employer, and may modify such rates in special cases, but may not depart from the basic minimum rates recommended by the Wage Board" (Section 557).

For violation of the directory order, after a hearing before the Commissioner, an employer may be publicized as a violator (Section 559).

After nine months the Commissioner, after a public hearing, may make the order mandatory; and violation of the mandatory order is a crime punishable by fine or imprisonment or both (Section 565).

Section 563 provides that

> "All questions of fact arising under this act except as otherwise herein provided shall be decided by the Commissioner or the Director and there shall be no appeal from the decision of the Commissioner or the Director on any such question of fact, but there shall be a right of review by the Industrial Board and the Courts as provided in Article 3 of the Labor Law from any ruling or holding on a question of law included or embodied in any decision or order of the Commissioner or Director."

The pertinent provision of the Labor Law provides for review by the State Supreme Court after an adverse decision by the Industrial Board. The Industrial Board is a part of the Labor Department over which the Industrial Commissioner has jurisdiction. The foregoing we believe to be a fair outline of the pertinent provisions of the statute under review.

POINT II.

The Act of Congress had one standard, the living wage; this State has added another, reasonable value. The Minimum Wage must include both.

Mr. Chief Justice Crane, speaking for the majority of the New York Court of Appeals, concluded his comparison of the Act of Congress, which was litigated in *Adkins* v. *Children's Hospital*, 261 U. S. 525, with the New York Minimum Wage Law as follows:

> "The New York Act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The Act of Congress had one standard, the living wage; this State Act has added another, reasonable value. The minimum wage must include both."

Supporting this finding of the Court of Appeals are Paragraphs 7 and 8 of Section 551, and Section 552, quoted supra (pp. 4, 5).

The peculiar phraseology of the New York Statute with respect to the standards of the minimum wage is partly explained by Mr. Justice Sutherland's criticism, in the Adkins case, of the cost of living standard in the Minimum Wage Act of Congress. Sound and logical as that criticism was, we think the authors of the New York Law over-emphasized it, and overlooked the basic point of the decision that any legislative act which fixes the amount of wages to be paid in connection with contracts other than for the performance of public work or in businesses impressed with the public interest, and deprives the employer and employee of the right of private bargaining in connection therewith, contravenes the constitutional

rights of both, without regard to whether the standard of the wage fixed by Government is the cost of living or the reasonable value of services, or both.

Those authors, however, were fully aware that the cost of living standard offered a more plausible excuse for the exercise of the police power than the reasonable value standard. Therefore Section 552 was written into the statute, outlawing employment of "any woman or minor in an occupation in this State at an oppressive and unreasonable wage, as defined in Section 551" of the Act; that is, one which is "both less than the fair and reasonable value of the service rendered and less than sufficient to meet the minimum cost of living necessary for health."

No Wage Board or Government official to whom the law delegates the power to fix a minimum wage can disregard this mandate of the statute. Reasonable value of the service of any employee is a fact dependent upon many conditions, and is even more difficult to determine than the amount sufficient to meet the necessary cost of living necessary for health, which, as Mr. Justice Sutherland observed, "will depend upon a variety of circumstances", so many and so variable and "so vague as to be impossible of practical application with any reasonable degree of accuracy."

The law provides that there is no appeal on questions of fact as determined by the Wage Board or the Commissioner. Those affected by the determination of these officials as to what is reasonable value or necessary cost of living have no redress from unreasonable and arbitrary determination of fact.

It is apparent that a reasonable value standard is as impossible of "practical application with any reasonable degree of accuracy" as is the cost of living standard. Many elements enter into the determination of reasonable value; this varies according to the character of the work, the skill required, and the experience, ability and industry of the worker; it varies in different establishments because dif-

ferent standards of ability and efficiency are required according to the class of patronage therein.

Moreover the element of value to the employer must be considered, for the reasonable value base works both ways, whereas the cost of living standard looks only to the varying necessities of the employee.

The legislature has here imposed upon administrative officers a double standard, doubly difficult of application.

How the Wage Board appointed to investigate the hotel and restaurant industries attempted to apply this double standard is revealed by its proposed wage order for those industries, hereto appended as Exhibit A.

By reference thereto it will be noted that the minimum wages are fixed for different parts of the State without regard to the varying value of services as determined by the factors above mentioned.

That the Board abandoned reasonable value and adopted a living wage standard is shown by the foregoing, and by the fact that the only differential in its minimum wage schedule for service and non-service employees,* respectively, is based on geographical location and the Board's estimate of the varying costs of living in metropolitan cities, smaller cities, and other communities.

By reference to Subdvision 8 of Section 551, and to Section 552, we find the Wage Board followed the law, which provides that in "establishing a minimum fair wage" the board "*may* (italics ours) take into account all relevant circumstances affecting the value of the service or class of service rendered". But the board is not required to take these factors into account. Indeed it could not do so, because the value of human labor depends on the factual situation in each individual case.

If the statute is upheld, no woman whose experience, ability and industry is worth to an employer less than the

*Note: "Service" employees are waitresses and bell boys who receive tips." "Non-service" includes all other employees.

minimum, will ever get a job; and no job in which the kind of work to be done is worth less than the minimum will go to a woman.

The more serious ground of objection to the law, however, is not the wage standard, but the substitution of Government fiat for freedom of individual bargaining as to amount of wages in industry not impressed with public interest.

POINT III.

The factual background of the District of Columbia Minimum Wage Law and the New York Minimum Wage Law is essentially the same.

The factual background recited in Section 550 of the New York Act as requiring the exercise of the police power presents a picture of economic conditions in industry and trade which is as old as industry itself. Certainly no one familiar with labor conditions during the last twenty-five years would presume to say that the conditions outlined in Section 550 of this Act are any different from what they were when the District of Columbia Law was enacted and when the Adkins case was decided. Any doubt about it is dissolved by reference to the briefs of Mr. Louis Brandeis (now Mr. Justice Brandeis) in the case of *Muller* v. *Oregon* in 1907

and again in the case of *Stettler* v. *O'Hara* in 1914 with their hundreds of pages of statistical background submitted to the Court in the effort to justify minimum wage legislation.

On page 136 of the brief of Mr. Brandeis in the Stettler case, in 1914, we find this comment:

> "Investigation has proved that the wages of women are fixed at present only by supply and demand. Earnings for the same work in a given industry vary from establishment to establishment. The wages fixed are neither by the value of the service rendered nor by what industry can afford."

On the same page he presents a report of the Social Survey Committee of the Consumers League in which it is said:

> "Owing to the lack of organization among women workers and the secrecy with which their wage schedules are guarded, there are absolutely no standards of wages among them. Their wages are determined for the most part by the will of the employer without reference to efficiency or length of service on the part of the worker. This condition is radically unjust."

And on page 137 of this brief Mr. Brandeis quotes from an article by Edith Abbott, Ph. D., Assistant Director of the Chicago School of Physics and Philanthropy, written in 1910, in which she says:

> "Today there is a group wage * * * but these are determined not by the bargaining power of the man, but often by the helplessness of the women and of the minor children who have become the apparent collectors of their own wages.

> From this helplessness which characterizes women workers in bargaining spring many difficult problems. There is the question of their inability to secure right conditions under which to do their work, to limit the amount and duration of their work so as to maintain their own health and that of their children. From this weakness arises the necessity on the part of the community of assuming control over the wage contract so as to protect women wage earners from undue exploitation * * *.".

Quoting from Volume 18, Employment of Women and Children in Selected Industries, Senate Document #645, Sixty-first Congress, Second Session, 1911:

> "Apparently the wages of women in factory industries are very largely unstandardized. In general they are low but the degree of their lowness seems not to vary very much with the character of the work done as with the custom of a given industry, or, more accurately, of a given employer for earnings within a given industry vary widely from one establishment to another.
>
> And when it comes to the question of earnings * * *, the determining factor seems not so much what their services were worth or what the industry could afford as the individual employer's attitude upon the matter, * * *. With some employers the lowest wages a woman or girl could be induced to work for decided what she could get."

In the *Adkins* case Mr. Frankfurter urged in support of the Minimum Wage Law essentially the same factual background set forth in the New York Law.

The language of the Supreme Court in Coppage v. Kansas, 263 U. S. 1, quoted on page 20 of this brief, reveals judicial knowledge then of the same economic conditions recited in the New York Law.

The factual background recited in the New York Law is wholly economic. The remedy, such as it is, provided in the law is likewise wholly economic. The Legislature asserts that it is acting "for the protection of industry; also for the protection of women employed therein and the public interest in their health and well-being and in prevention of deterioration of the race."

After reciting these facts, which present a case for proper regulation rather than attempted wage fixing, the Legislature states its purpose to do in this act what it wholly fails to do.

The regulation or limitation of hours bears an obvious relation to the health and well-being of women, and has been sustained; but a restriction as to the amount of wages which a woman may be permitted by law to accept for her services bears no relation whatever to her health, or to the deterioration of the race, or to the public interest in either.

Neither does a minimum wage for women, which is not likewise applicable to men, protect industry.

This law attempts to correct inequalities of fortune inevitable under a capitalistic system and our constitutional form of Government, which recognizes private ownership of property and personal liberty; the announced purpose to protect industry is an admitted attempt to protect employers in industry against unfair competition upon which a minimum wage for women alone has little bearing or effect, and in which the public interest and welfare is only remotely concerned.

The statute does not practice what it preaches. An attempt to level economic inequalities by interference with the normal exercise of property rights does not promote the health of women, nor of trade; and how it can affect the deterioration of the race is beyond our powers of imagination.

POINT IV.

A minimum wage for women alone is not corrective of the conditions recited in the New York Law as justifying its enactment, either as a protection to women, industry or the public interest and welfare. The statute works discrimination against and fraud upon women in their competition with men for employment in industry and trade.

All of the legislative recitals in Section 550 are set forth as applying to women employed in industry. There is not one condition or fact therein recited which does not apply with equal or greater force to men. Their wages, too, often bear no relation to value of service; they, too, are exploited by some employers; and the employer who pays his men oppressive and unfair wages competes just as unfairly and effectively as the chiselling employer of women. More men than women are employed in industry; more men than women support dependents; and the health and well-being of adult women and of children is just as injuriously affected when a man cannot earn a living wage or a reasonable wage for his family as when a woman cannot do so. The effect as to "deterioration of race" is the same in either case.

In this situation the legislature enacts a minimum wage law for women only, leaving men free to bargain without interference by or assistance from the State, according to the social viewpoint.

A minimum wage for women alone cannot cure bad employment conditions common to both sexes; moreover, it works an unfair discrimination against woman in her competition with men for employment.

Proponents of this form of social legislation have argued before Legislative Committees and before the Courts that while woman stands before the law on an equality with man, she requires special protection by the State because she is physically his inferior and because of her childbearing functions.

This is a sound argument in support of proper protective regulation such as limitation of hours and provision for proper conditions of employment, which have some relation to health, but it is fallacious in support of a minimum wage law whose only purpose and effect is to readjust economic relations between employer and employed.

If a law fixing the amount of wages is not a health measure affecting general welfare (and freedom to fix the amount of wages surely is not dangerous to health, morals or safety), then it is not a health law for women any more than it would be for men.

Hours of service laws have been sustained as to women (Muller v. Oregon, 208 U. S. 412) and likewise as to men (Bunting v. Oregon, 243 U. S. 426).

Statutes limiting hours of service in certain occupations and prescribing rest days, applicable to both sexes, are much in evidence in the Labor Law of the State.

On the other hand, if a law fixing the amount of wages *is* a health measure required for the protection of general welfare, why has it been applied to women alone and not to men, since both stand equal before the law and the health of men as well as women has been held to be a matter of public concern? The answer to this is that the American Federation of Labor has consistently opposed Minimum Wage Laws for men. Its announced policy is minimum wages for women and minors and collective bargaining for men. The Federation cannot be accused of laches in promoting the interests of its members, or of lack of political acumen and power in getting the labor laws it wants. This was illustrated in the enactment of the New York Minimum Wage Law. At the time it was enacted by the Legislature, another bill introduced by Senator Desmond, which provided a minimum wage both for men and women, as an emergency measure, was also passed by both houses, and both bills were placed on the Governor's desk for approval, pending which a hearing on both was held before

the Governor. At this hearing the Federation opposed the emergency bill for men *and* women, and urged approval of the bill which applied to women and minors only. The sexless wages bill was vetoed, and this bill was approved by the Governor, with the explanation that he had been advised that the constitutionality of a bill fixing a minimum wage for men was doubtful.

On this point the comment of Mr. Justice Sutherland in the Adkins case is pertinent:

> "We cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationship."

Also the comment of Mr. Justice Harlan in *Adair* v. *United States,* 208 U. S. 161, 174:

> "The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it * * * in all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no Government can legally justify in a free land."

This statement of fundamental rights under the Constitution applies to men and women alike.

POINT V.

The law deprives employers and employees of their rights under the Fourteenth Amendment to the Federal Constitution and Article 1, Section 6 of the State Constitution.

As we have pointed out, this is purely a wage fixing statute. It does not aim to regulate hours or conditions of labor, protect safety of employees in dangerous employments, or to prevent fraud. Its sole purpose and effect is to substitute Government control of the amount of wages and deprive employers and employees of the right of bargaining as to the amount of wage to be paid.

This arbitrary deprivation of constitutional rights is sought to be justified by labelling it "an exercise of police power to promote general welfare" and then arguing that the means adopted to accomplish the purpose sought is reasonable and not arbitrary, and that the burden of proving the contrary is upon him who attacks the validity of the law.

But we submit that the question at issue in this case is not whether within the domain of the police power the legislature has acted with discretion and with reason, *but whether the law is within the domain of the police power at all.* The declaration of the legislature that "in the considered judgment of the legislature this article is constitutional" does not preclude this Court from pronouncing it otherwise any more than the equally solemn declaration of the New York Court of Appeals that the law is not constitutional, precludes this Court from finding that it is.

In *Coppage* v. *Kansas*, 236 U. S. 1, it was urged that employees as a class were at a disadvantage in making contracts because they were not financially able to be as independent as their employers and that it was necessary for the State to step in and aid one party to the contract. It is urged likewise in this case that women are not on

equal terms either with their employers or with men in bargaining for employment; and that selfish employers take advantage of this situation and "compel" women to work for less than what their services are worth and less than the amount necessary for healthful living. Because of this fact the proponents of this law contend that the State should step in and level these inequalities of bargaining power in the interest of social justice.

With reference to this same contention in the Coppage case (236 U. S. 1, 15), the Court said:

> "It seems to us clear that a statutory provision *which is not a legitimate police regulation* cannot be made such * * * by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power." (Italics ours.)

Again (p. 17):

> "It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

And on page 19:

> "The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment."

When the question is whether the legislative body has exceeded its authority (not whether it has abused its discretion), the Courts are at liberty and under a duty to determine whether the authority has been transcended.

In *Mugler* v. *Kansas* (123 U. S. 623) Mr. Justice Harlan said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the situation."

In the case of *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, the Chief Justice said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm it will make from breaking down recognized standards."

The Fourteenth Amendment was intended to safeguard the liberty and property of individuals against the action of governmental majorities temporarily in power, regardless of whether such action is inspired by social reformers with benevolent motives or by special interests with selfish motives. The proponents of this law, who urge that freedom of contract is a fallacy, have overlooked the far-reaching consequences of a decision by this Court placing the stamp of its approval upon a law depriving individual citizens of rights long believed secure under the Constitution and conferring upon Government officials the right to fix the amount of wages to be paid in common occupation.

Prior to the decision of this Court in the Adkins case, we cannot find that the constitutionality of a wage fixing law had been directly passed upon by the Court, although

the question had been involved in many prior cases which were in that case painstakingly analyzed and reviewed by the Court; and its decision in that case has since been accepted by bench and bar as conclusive upon the question now again presented.

Because the prior labor cases were so thoroughly reviewed in the Adkins decision, we make only brief reference to prior pertinent cases.

In *Coppage* v. *Kansas* (236 U. S. 1, 14) this Court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.
>
> Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense."

And again in the same case, at page 17:

> "As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof.' No doubt, whenever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that whenever the right of private property and the right of free contract coexist, each party when con-

tracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In *Frisby* v. *United States* (157 U. S. 160, 166) this Court said:

"Generally speaking, every citizen has a right freely to contract for the *price* of his labor, services or property." (Italics ours.)

In *Truax* v. *Raisch* (239 U. S. 33, 41) this Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

Again in *Prudential Insurance Co.* v. *Cheek* (257 U. S. 516) the Court said:

> "That freedom in the making of contracts of personal employment * * * is an elementary part of the rights of personal liberty and private property."

In *Wilson* v. *New* (243 U. S. 332) this Court said:

> "The right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

In *Wilson* v. *New* and in *Fort Smith and Western Railroad Co.* v. *Mills* (253 U. S. 206) it was held that the utmost to which the legislative power extends is to provide for the *temporary* continuance of wages in a business affected with a public interest, where necessary to prevent the stoppage of the public business until the parties could agree; and that beyond this, the freedom of contract with respect to wages is not subject to be controlled or be prevented by public authority.

Upon his review of these and other cases, Mr. Justice Sutherland distinguished the District of Columbia Minimum Wage Law from other statutes limiting freedom of contract between employers and employees, which the Court had sustained as valid. He found that all of the

cases in which the interference with due process had been upheld fell within one or another of the following four categories:

1. Statutes fixing rates and charges by business impressed with public interest.

2. Statutes limited to contracts for the performance of public work.

3. Statutes prescribing the character, methods and time of payment of wages.

4. Statutes fixing hours of labor.

We submit that the New York Minimum Wage Law is not within any of the foregoing classes; it falls completely outside the bounds of the police power.

The *Adkins* case has since been followed by this Court in the following cases:

Charles Wolf Packing Co. v. *Court of Industrial Relations of State of Kansas* (1923), 262 U. S. 522;
Murphy, as Attorney General, v. *Sardell,* 269 U. S. 530 (1925);
Donham v. *West-Nelson Mfg. Co.,* 273 U. S. 657 (1927);
Ribnik v. *McBride,* 277 U. S. 350 (1928);
Tyson v. *Banton,* 273 U. S. 418.

The *Wolf Packing Company* case involved the validity of the Court of Industrial Relations Act of Kansas which, among other things, provided that the Court of Industrial Relations could hear wage disputes and if it found public peace and health imperilled could make findings and fix wages. The Supreme Court held that so far as the statute

permitted wage fixing, it deprived the employer of its property and liberty of contract. The opinion was by Judge Taft, who dissented in the Adkins case.

The case of *Murphy* v. *Sardell* was an affirmance, per curiam, of a judgment of the Arizona District Court, holding, on the authority of the Adkins case, that the Arizona Minimum Wage Law was unconstitutional. Justice Holmes states that his concurrence is solely on the ground that he is bound by the decision in the Adkins case.

The case of *Donham* v. *West-Nelson Mfg. Co.*, involved the Minimum Wage Law of the State of Arkansas, which had been held void by the Eastern District of Arkansas. The judgment of the lower Court was affirmed, per curiam, on the authority of the Adkins and Murphy cases.

Tyson v. *Banton* was not a wage fixing case. It involved the constitutionality of a New York law prohibiting the resale of any theatre ticket at a price in advance of the price printed on the face of the ticket; the law was held void as an arbitrary and unreasonable interference with freedom of contract.

In the case of *Ribnik* v. *McBride* the Court held that a New Jersey act regulating employment agencies and conferring upon the Commissioner of Labor power to fix prices which the agent charged for his services, violated the Fourteenth Amendment.

Mr. Justice Sutherland, speaking for a majority of the Court in *Williams* v. *Standard Oil Co.* (278 U. S. 235, 239), said:

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest' " (citing the *Wolff*, *Tyson*, *Fairmont* and *Ribnik* cases).

Chief Justice Hughes, in *Near* v. *Minnesota* (283 U. S. 697, 707, 708), cited the *Adkins, Tyson* and *Ribnik* cases in support of the broad proposition which he thus stated:

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States,* 157 U. S. 161, 165), this court has held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, *notably with respect to the fixing of prices and wages.*" (Italics ours.)

We show in Point III that the factual background recited in the preamble of the New York law, presents nothing essentially different from the factual background presented to the Court by voluminous factual briefs submitted in the Adkins case.

We also show, in Point II, that the New York law has the double standard, living cost and value of service while the District law had only the single standard of living cost.

We find nothing in the legal argument presented by the Attorney General of New York, nor in the brief submitted by the Attorney General of Ohio, to justify a different conclusion as to the constitutionality of this wage law from that reached by the Court in the Adkins case.

The Attorney General has cited the cases of *Nebbia* v. *People,* 291 U. S. 502, and *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194.

In both these cases the constitutionality of the *Emergency* Milk Control Law of New York was at issue.

Section 258a, the first in Article 21a, recites the *public emergency* in the milk industry which the Legislature reasonably expects to continue until April 1, 1936.

In its decision, after reviewing the seriousness of the emergency and the methods prescribed to correct it, the Court observes that "save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry".

While the milk industry has never been *legally* defined as a public utility, like railroads and lighting companies whose rates and prices are fixed by public service commissions, the milk industry *factually* affects the public health and welfare more vitally than any of the industries which have been legally defined as public utilities. That this influenced the decision of the Court is a reasonable assumption in view of the Court's comment that the milk industry is not a public utility in a *legal* sense.

Prior to the advent of railroads and electric lights and telephones, our forefathers lived healthfully, unconscious of inconvenience, but from the day that the first child was born milk has been a vital necessity of life. Any condition which interrupts a continuing fresh supply of milk is admittedly a matter of such concern to the public that there is basis for the argument that the Emergency Milk Control Law is justified as a measure of protection of public health and even life itself.

These two cases are easily distinguished from the case at bar in applying the test of constitutionality.

The law under consideration in the *Nebbia* and *Borden* cases was admittedly an emergency law designed to provide temporary relief.

The Minimum Wage Law is not stated or designed to meet an emergency; its provisions enact a permanent, social, economic and political policy of the State. This law permitting Government to fix the amount of wages of women affects the general public health and welfare most remotely, if at all.

The whole history of labor litigation in the Supreme Court reveals a judicial attitude, consistently maintained,

that one of the most important rights guaranteed to our citizens by the Fourteenth Amendment is the right to fix between themselves the *amount* of wages to be paid and received for personal service in common employment.

Fully conscious of this history, the Attorney General of this State and the Attorney General of Ohio advance here the argument, which was submitted to the New York Court of Appeals, that "new and changing conditions create new public needs and justify new restrictions on the rights of individuals for the common good".

In this they overlook the fact that the issue here is not one of social policy but of legislative power and constitutional right.

Fundamental constitutional guaranties do not change with the ebb and flow of economic tides, or political policies.

Any intimation that the Constitution is flexible, even in response to the police power, is unsound. Its fundamental guaranties may not be struck down. Within the police power the State may legislate to meet changing conditions, providing it is done without altering fundamental principles, one of which is that no person may be deprived of his property without due process of law. If the Legislature in response to public clamor for experimental social reform, may break down these constitutional guaranties by declaring that in its "considered judgment" the law is a "health law" or a "public welfare law", all guaranties of the Constitution, under the alleged exercise of the police power, may be modified or wholly eliminated. The tendency to socialize property rights under such subterfuge is dangerous to the continuance of our free institutions.

The "new and changing conditions" which motivate the urge for "new restrictions on the rights of individuals" are not economic; they are changes in social theory and political policy by disciples of that school of thought which believes in restriction and regimentation of American citizens and American business.

The distinguished leader of this group has admitted that the powers recently sought by and granted to Government would be dangerous in the hands of officials actuated by other than benevolent motives. In Government, however, benevolent paternalism is not far removed from tyranny.

The provisions of our Constitution show full realization by the wise and far-seeing men who drafted that instrument, that the only tyranny the citizenship of this republic need fear is from the Government itself.

Alexander Hamilton wrote a warning against attempted legislative or judicial amendment of fundamental constitutional guaranties in response to public clamor. He declared it to be a "fundamental principle of Republican Government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the Judges to do their faithful duty as guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community" (The Federalist, Chap. 78).

The argument that new and changing conditions justifies a law depriving employers and employees, in common

employments, of the right to bargain with respect to the amount of wage to be paid, fails to distinguish between legislative discretion and legislative power. They have cited many cases in support of the rule that where there is power, legislative discretion, in its exercise, will be accorded favorable presumption. As to this there is no issue. But if there is a total lack of power, the Legislature has no jurisdiction to determine for itself the possession of power, and its declaration that the law is enacted in the exercise of a power which it does not possess, is of no effect.

As this Court said in *Traux* v. *Raich,* 239 U. S. 33:

> "We have frequently said that the Legislature may recognize degrees of evil and adapt its legislation accordingly, but underlying the classification is the *authority to deal with that at which the legislation is aimed.*" (Italics ours.)

If the Legislature has the power to deprive women of freedom of contract as to the wage for which they will work, we see no reason why the same right may not be taken from men with whom women stand equal before the law and within the constitutional guaranties. No greater calamity could befall the wage earners of this country than to have the legislative power to fix wages upheld. It is paternalism in the highest degree, and if sustained will be a serious blow to the principle that the State exists for the citizens and not the citizens for the State.

Unless we jealously guard and zealously maintain the fundamental rights guaranteed in the Constitution, we shall find perhaps too late that we have sacrificed our freedom on the altar of autocracy.

We conclude with the comments of this Court in the recent case of *Jones* v. *Securities and Exchange Commission:*

"Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. Goldsby, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequence of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

We contend, therefore, that Article 19 of the Labor Law should be held void as contravening both the Federal and the State Constitutions.

Respectfully submitted,

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APPENDIX.

Exhibit A.

PROPOSED ORDER OF THE MINIMUM WAGE BOARD FOR THE HOTEL AND RESTAURANT INDUSTRIES.

SEC. I. As used in this order: 1. "Hotel" means any establishment which as the whole or a part of its business or activities offers lodging accommodation for hire to more than five persons, excluding, however, establishments in which lodging accommodations are incidental to medical care, religious observance, instruction, or to the care of handicapped or destitute persons.

2. "Restaurant" means any establishment (other than a medical, religious, or educational institution, or an institution engaged in the care of handicapped or destitute persons) which prepares and offers for sale food for consumption either on any of its premises, or by catering and banquet service, or by box lunch service, or by curb service; the term "food" includes nutritive material intended for human consumption, in solid or liquid form, whether cooked or uncooked, or otherwise prepared, excluding, however, medicinal or quasi-medicinal preparations.

3. "Employee" means any female or minor person who is employed, permitted, or suffered to work in or in connection with any hotel or restaurant in service related to the furnishing of food or lodging or both.

4. "Employer" means any hotel or restaurant employing one or more employees.

5. "Service employee" means any employee whose duties relate solely to the serving of food to customers who are seated at tables and to the performance of duties

incidental to the setting of such tables, or any employee whose duties are solely those of a bell boy or page boy.

6. "Non-service employee" means any employee who is not a service employee.

7. "Resident employee" means any service or non-service employee who lives upon the premises of her employer.

8. "Hour of employment" means any hour during which an employee is subject to the directions of her employer, and includes any time devoted by an employee at her employer's request to inspection or instruction periods.

9. "Working equipment" means all uniforms, covers, aprons, collars, cuffs, and head-dresses which are worn by an employee in order to satisfy the directions of her employer as one of the requirements of her employment.

10. "Population". The population of localities within this State shall be deemed to be the same as the population therefor as shown by the latest official census.

SEC. II. Non-service employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, at the rate of not less than 27¢ for each hour of employment.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, at the rate of not less than 26¢ for each hour of employment.

(c) When employed in a hotel or restaurant located elsewhere in the State, at the rate of not less than 25¢ for each hour of employment.

SEC. III. Service employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, at the rate of not less than 18¢ for each hour of employment.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, at the rate of not less than 17¢ for each hour of employment.

(c) When employed in a hotel or restaurant located elsewhere in the State, at the rate of not less than 16¢ for each hour of employment.

SEC. IV. An employee shall be paid for each hour or fraction of an hour of her employment at the rate prescribed in this order, but in no event shall she be paid for less than three such hours in any day on which she has reported for work pursuant to her employer's instructions.

SEC. V. Time during regular working hours and at all other periods when employees are required to wait on the premises and no work is provided by the employer, shall be paid for at the employee's regular hourly wage rate. Employees who are employed on a split shift shall be compensated at their regular hourly wage rate for any time in excess of a total of three hours between the shifts worked in any one day.

SEC. VI. 1. Resident employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, in an amount not less than $9.50 for each calendar week during which such employee is in the service of such employer.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, in an amount not less than $9.00 for each calendar week during which such employee is in the service of such employer.

(c) When employed in a hotel or restaurant located elsewhere in the State, in an amount not less than $8.50 for each calendar week during which such employee is in the service of such employer.

2. A resident employee shall be furnished with full maintenance by such employer during the continuance of her employment.

SEC. VII. 1. No charge shall be made by an employer for any meal furnished by an employer to his employee. The term "meal" as used in this section means any food furnished by an employer to an employee while such employee is on the employer's premises as a condition of her employment.

2. Where an employee is not furnished with meals by her employer, the minimum hourly rate of cash pay to which such employee is entitled by Sections II, III and VI of this order shall be increased by the addition of six cents.

SEC. VIII. All working equipment must be furnished, repaired, and maintained at the expense of the employer. No employee shall be required to contribute directly or indirectly to the cost of such furnishing, repairing, or maintenance.

SEC. IX. No employer shall make or require any charges against or take deductions from an employee's wages for any cause of whatever description, except, by the employee's written consent, for insurance premiums or membership dues in an agreed amount.

REGULATIONS.

1. *Payment of wages.* (a) Employers shall pay the wages of their employees in cash; but an employer may pay his employees in check if he furnishes satisfactory proof to the Industrial Commissioner of his financial responsibility and gives reasonable assurance that such checks may be cashed by employees without difficulty and for the full amount for which they are drawn.

(b) Every employer shall pay at least weekly to each employee the wages earned by the employee to a day not more than six days prior to the date of such payment.

2. *Statement to employee.* Each employee subject to Director Order No. 2 shall, at the time of receiving payment of wages, be informed by the employer of the basis upon which the amount of the wage payment was determined. Such information must be given by the employer to the employee on a form prescribed by the Commissioner or in such other manner as he may determine to be suitable.

3. *Learners and apprentices.* The minimum fair wage standards which are stated in Directory Order No. 2 apply to all female and minor employees, except as otherwise provided in this regulation. No learner's or apprenticeship period shall be recognized. But for purposes of Directory Order No. 2, a "learner" shall be a person who, while a regularly enrolled student in an institution of higher learning, is required by such institution to acquire experience in hotel or restaurant problems by accepting employment in a hotel or restaurant. Application for a learner's permit, to be issued by the commissioner and to be valid for such period as he may determine, must be made to the commissioner on a form furnished by him and must be accompanied by such proofs of the applicant's status as the commissioner may require. Directory Order No. 2 shall not be deemed

applicable to persons to whom a learner's permit has been issued.

4. *Fractions of hours.* Time worked shall be reckoned to the nearest unit of fifteen minutes. Illustration: If employee A works seven hours and ten minutes, A is entitled to wages for 7¼ hours; if Employee B works seven hours and twenty minutes, B is entitled to wages for 7¼ hours.

5. *Insurance and membership charges.* No charge shall be made or deduction taken from any employee's wages for insurance premiums or membership dues, until the employer's application for permission to make such charge or deduction has been received and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly. Always provided, however, that where any such charge or deduction has been customarily made by the employer prior to the date of taking effect of Directory Order No. 2 and where the employer makes application for permission to make such charge or deduction within ninety days of the date of taking effect of Directory Order No. 2, any such charge or deduction may continue to be made until the employer's application has been disapproved by the Division of Minimum Wage.

6. *Contributions for busboys.* No employer shall exact from an employee any sum to be paid to a busboy or other employee of such employer, nor determine any sum so to be paid, nor designate any employee to collect any such sum from any other employee, nor require any employee directly to pay or to contribute any such sum.

7. *Lodgings to be approved.* No employer shall be privileged to employ resident employees unless such employer is registered with the Division of Minimum Wage. Such registration shall be made in a form prescribed by the Com-

missioner. Registration may be cancelled by the Division of Minimum Wage whenever it determines, after appropriate notice and hearing, that the lodging or food furnished or proposed to be furnished by an employer to his resident employees is not sanitary and of good quality. The Division of Minimum Wage may make such inspections and require such information as it may deem necessary to assist it in making such determinations.

8. No variations permitted. No employee as a condition of employment may be required to accept any variation from the requirements of Directory Order No. 2 or of these regulations.

9. *Certificate of age.* For purposes of this order each employer shall keep on file a certificate of proof of age for each male minor employee. "Minor", as used in Directory Order No. 2 and in these regulations, means a person of less than twenty-one years in age.

10. *Records.* Each employer shall keep a record, in a form satisfactory to the Commissioner, of the name and address of each of his employees, showing the hours worked daily and the wages received each week by each such employee and of lodgings and meals furnished, and deductions, if any, during the preceding twelve months' period; and shall, on demand of the Commissioner, submit a sworn copy of such record to the Commissioner, together with such other information as the Commissioner may deem necessary to assure compliance with Directory Order No. 2.

11. *Posting.* A notice issued by the commissioner, setting forth the provisions of Directory Order No. 2 and regulations pertaining to it, shall be posted conspicuously in the place of business of each employer. The commissioner may require an employer to post more than one copy of such notice if he deems such posting necessary to acquaint employees with the contents of the notice.

NOTE.

The employer members of the Wage Board unanimously opposed the foregoing order, for reasons apparent in the order itself.

Sections II and III fix a differential between non-service and service employees of 9¢ per hour to cover the estimated gratuities received by service employees. A flat rate per hour is fixed for all non-service employees, doing a great variety of work, without regard to the character of the work, the skill required, the experience, ability or industry of the worker, the value of the work to the employer, the condition of his business, or the varying grades of employees required by the character of the establishment and of its patronage.

The only other differential is based upon geographical location, in deference to the varying living costs in the communities for which the differentials are established. In Section VI, applicable to resident employees, a like geographical differential is established for large cities, small cities and elsewhere, based on living cost. Otherwise the rate is the same for all classes of employees both non-service and service, regardless of gratuities received by the latter and of all other factors affecting value.

Section III, paragraph a, of the proposed wage order prescribes an hourly wage rate for waitresses (service employees) in cities of 200,000 or more of 18¢ if meals are furnished and 24¢ if meals are not furnished. This applies to them as a class regardless of how many or what kind of meals are furnished, the ability or experience of the employee, the character of the place in which she works, or the additional remuneration she receives in tips, which latter will vary greatly in amount according to the establishment and class of patronage therein.

To argue that this is a fair quantum meruit wage is obviously absurd. Under this scale assume that two waitresses work in two different establishments forty-four hours in one week and that they are of equal ability and skill. Each will receive cash wages from the employer of

$7.92. One may receive two meals, the other three meals per day. One may receive good meals and the other bad. One may receive, owing to the character of the establishment, $5.00 or $6.00 a week in tips and the other, where the patronage is of a different character, may receive $15.00 or $20.00 a week.

In any action to recover compensation on a quantum meruit basis, all these factors would be considered, and that they vary greatly in individual cases must be admitted. This shows how utterly impossible it is to fix a wage for a class on a quantum meruit basis.

This situation is not due to any failure by the Board to follow the law which delegates to wage boards and to the Commissioner the power and authority to fix what they deem to be a fair wage, based upon what they may (or may not) take into consideration according to their discretion which is not controlled by any definite standard fixed by the law.

Section 551 defines a fair wage as one which is "fairly and reasonably commensurate with the value of the service or class of service rendered".

Under paragraph 4 of Section 555 the Board "shall submit a report including its recommendations as to minimum fair wage standards". It appears, therefore, that the law delegates to the Board authority to determine as a fact (with no right of appeal), and to fix, its own standards, unhampered by any mandatory provision other than that contained in Section 552, which outlaws the employment of any woman at a wage which is less than the fair value of her services and less than sufficient to meet the minimum cost of living necessary for health.

Fair value of service is so variable that it cannot be standardized for any general class of workers. This law delegates authority not only to fix the amount of wages, but to fix its own standard therefor. This being so, no citations are necessary in support of the contention that it is void for this reason alone, without regard to its other constitutional infirmities.